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No. 10-240

Supreme Court, U.S.
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In the Supreme Court of the United States

JOHN STEADMAN NILSEN, *Petitioner-Appellant,*

v.

THE STATE OF CALIFORNIA, *Respondent-Appellee.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE RESPONSE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of a petition for review in the California Supreme Court, which is a second-tier discretionary review, results in a decision on the merits, thus requiring this Court to reconsider and/or limit *Ross v. Moffitt*, 417 U.S. 600 (1974).

2. Whether petitioner was denied the effective assistance of counsel under the constitution when his attorney did not file a petition for review in the California Supreme Court (second-tier discretionary review) following the denial of his appeal (first-tier review)

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STATEMENT OF THE CASE

Petitioner entered the 99 Cents Only store in Huntington Beach, California, brandished a large silver revolver, and asked the store manager, "Where's the safe?" Petitioner and a store employee walked to the front of the store to the cash register where Shawna Wolfgram was working. Petitioner began to grab money from Wolfgram's open cash register. Wolfgram asked petitioner what was happening, grabbed petitioner's arm, and then exclaimed that she was being robbed. Petitioner raised his revolver and shot Wolfgram in the chest, killing her.

An Orange County Superior Court jury found petitioner guilty of first degree murder and second degree robbery. The state trial court sentenced petitioner to state prison for three consecutive life terms without the possibility of parole, plus eighty years.

On June 30, 2008, the California Court of Appeal affirmed the judgment. Petitioner's petition for review to the California Supreme Court was due on August 11, 2008. Cal. Rule of Ct. 8.264(b) & 8.500(e)(1). Petitioner did not timely file a petition for review. Rather, more than a year later, on September 29, 2010, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, seeking leave to file a late petition for review. The California Supreme Court denied that petition without comment. Petitioner then petitioned for certiorari.

REASONS FOR DENYING CERTIORARI

I. THE DENIAL OF A PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT IS A SECOND-TIER DISCRETIONARY REVIEW THAT DOES NOT CONSTITUTE A DECISION ON THE MERITS; THE STATE COURT'S RULING IN THIS CASE DOES NOT CREATE A CONFLICT WITH THIS COURT'S JURISPRUDENCE OR CREATE A CONFLICT IN THE LAW

Following the denial of his appeal, petitioner failed to file a petition for review in the California Supreme Court. His subsequent petition for writ of habeas corpus, seeking leave to file a belated petition for review, was denied. Petitioner now asserts that the denial of a petition for review in the California Supreme Court results in a decision on the merits. Thus, according to petitioner, he was entitled to an attorney and effective assistance in filing a petition for review under *Halbert v. Michigan*, 545 U.S. 605 (2005). (Pet. at 7.)

Petitioner's claim is based on a faulty premise and does not warrant review by this Court. A petition for review in the California Supreme Court is a second-tier discretionary appeal to the state supreme court. A denial of such a petition does not constitute a decision on the merits. Consequently, petitioner had no right to effective counsel for purposes of filing his petition for such discretionary review in the California Supreme Court. Further, this case does not create a conflict in this Court's jurisprudence and is not an appropriate vehicle for this Court to expand upon established precedent regarding the right to counsel in discretionary appeals.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court recognized that the Fourteenth

Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right. This Court held that "fair procedure" and "equality" demand that the indigent be given the benefit of counsel in such a situation. *Id.* at 357–358.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court declined to extend the right to counsel beyond a defendant's first appeal from his criminal conviction. In *Ross*, the petitioners sought the appointment of counsel for a second-tier discretionary appeal to a state of North Carolina Supreme Court and for certiorari review to the Supreme Court. *Id.* at 604. This Court held that neither the due-process clause nor the equal-protection clause requires a state to provide an indigent with counsel either on his discretionary appeal to the state supreme court or on his petition for certiorari in the United States Supreme Court.

In *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam), this Court held that a state criminal defendant has no Fourteenth Amendment right to the effective assistance of counsel when pursuing a discretionary state appeal. "Since respondent had no constitutional right to counsel he could not be deprived of the effective assistance of counsel." *Id.* at 587-88. The four-paragraph opinion relies only on *Ross v. Moffitt*.

Finally, in *Halbert v. Michigan*, 545 U.S. 605 (2005), this Court evaluated the right to counsel in the context of a Michigan law providing that "an appeal by an accused who pleads guilty or nolo contendere shall be by the leave of the court." *Id.* at 609., citing Mich. Const., art. 1 § 20. This Court ruled that the Michigan Court of Appeals' review of an application for leave to appeal ranks as a first-tier appellate proceeding requiring appointed counsel for indigent defendants under *Douglas*. This Court

reasoned that two aspects of the Michigan Court of Appeals' process following plea-based convictions compelled this conclusion. *Id.* at 617. First, the Michigan Court of Appeals must look to the merits of an appellant's claims in ruling on the application for leave to appeal. Second, indigent defendants pursuing review in the intermediate appellate court are frequently ill-equipped to represent themselves. *Id.*

Relying upon the reasoning of *Halbert*, petitioner contends that the denial of a petition for review by California Supreme Court is a ruling on the merits and that, as such, he was entitled to effective assistance when filing a petition for review. Petitioner is incorrect.

In California, Rule of Court 8.500 governs a party's right to file a petition in the Supreme Court for review of any decision of the Court of Appeal. California Rule of Court 8.500(b) identifies the grounds for which the state Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

The order of denial is not an expression of the Supreme Court on the correctness of the Court of Appeal opinion. *People v. Triggs*, 8 Cal. 3d 884, 890 (1973); *People v. Saunders*, 5 Cal. 4th 580, 592 n.8 (1993) ("We recently reaffirmed 'the well-established rule in this state that a denial of a petition for review is not an expression of opinion of the Supreme Court

on the merits of the case. [Citations.]' (*Camper v. Workers' Comp. Appeals Bd.* 3 Cal. 4th 679, 689, fn. 8 (1992) [12 Cal.Rptr.2d 101.)"); *Trope v. Katz*, 11 Cal. 4th 274 (1995) ("It is well established that our refusal to grant a hearing in a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court.") (internal quotations omitted); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 605 n.3 (9th Cir. 1986); *see also* Cal. Rule of Ct. 28 Advisory Com. comment ("It has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. . . . Denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion.")(internal citations omitted).

A petition for review in the California Supreme Court is a second-tier appeal following a decision by the court of appeal. This matter is clearly unlike *Douglas* and *Halbert*, which involved first-tier appellate proceedings. *Halbert* recognized a right to counsel in certain "discretionary" proceedings. The appellate procedure at issue there was effectively the only means of direct review available to the petitioner. The appeal procedure at issue in *Halbert* was "discretionary," but was equivalent to direct review. Here, like in *Ross*, petitioner already received direct review of his convictions, and already received the assistance of counsel in connection with that first appeal. Like *Ross*, a petition for review involves a second-tier discretionary appeal to a state Supreme Court following a first-tier appeal to the Court of Appeal in which the right to counsel had attached.

Ross at 604. As such, neither the due-process clause nor the equal-protection clause required that California provide petitioner with counsel on his petition for review. Consequently, since petitioner had no constitutional right to counsel he could not be deprived of the effective assistance of counsel. *Wainright*, 455 U.S. at 587-88. *Ross* and *Wainright* are directly on point and this case does not create a conflict with this court's jurisprudence or create a conflict in the law regarding effective assistance counsel. *See also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals.")

Petitioner's reliance upon Ninth Circuit habeas corpus case law for the proposition that a denial of a state petition for review results in a decision on the merits is completely misplaced. (Pet. at 7.) These cases express that the California Supreme Court's denial of a habeas petition will be a ruling on the merits sufficient to exhaust a federal claim for purposes of subsequent federal habeas corpus review. California law, however, makes it clear that the denial of a petition for review by the California Supreme Court is not an expression on the merits of the cause.

In any event, this case would present a poor vehicle for this Court to further reconsider or limit the holding in *Ross v. Moffitt*. Petitioner never raised this argument in the California courts, nor did he seek to have counsel appointed for purposes of filing a petition for review. The California courts, then, were precluded from considering petitioner's claim. This court would be the first to do so.

In sum, petitioner's justifications that this Court grant certiorari rest entirely on the faulty

premise that the denial of a petition for review by the California Supreme Court results in a decision on the merits. As shown above, petitioner is wrong. None of petitioner's claims warrants granting certiorari.

II. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS NO MERIT AND DOES NOT WARRANT GRANTING CERTIORARI

Petitioner contends that he was deprived of effective assistance of counsel because the attorney for his direct appeal failed to file a petition for review in the California Supreme Court. He suggests that his appellant counsel was constitutionally obligated under his first-tier obligations to file his Petition for Review. Because there is no right to counsel for seeking a discretionary review, as is involved with a petition for review to the California Supreme Court, counsel's failure to file the Petition for Review in the California Supreme Court cannot be deficient performance. *Ross,* at 616.

Even if he had a constitutional right to effective assistance here, petitioner's claim would fail. To establish ineffective assistance of counsel, Petitioner must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies equally to appointed appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985).

To establish ineffective assistance of counsel the defendant must show both incompetence and prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *Strickland,* at 687. As to competence, the defendant must show that counsel was deficient, i.e., "counsel's representation fell below an objective

standard of reasonableness." *Strickland,* at 688. Even if incompetence is established, that alone does not justify reversal. The defendant must also show prejudice. Specifically, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 693-94.

Here, petitioner cannot demonstrate he suffered prejudice by the failure to file a petition for review because it is highly unlikely such review would have been granted had a petition been filed. The Court of Appeal opinion (Pet. App. E, at 35-50) was sound, did not involve a split in authority, or an important question of law. *See* Cal. Rule of Ct. 8.500(b)(1). Petitioner cannot demonstrate he was prejudiced by his counsel's failure to file a petition for review.

Furthermore, petitioner certainly had an adequate alternate remedy. When petitioner first learned that his petition for review had not been filed, petitioner could have filed a petition for writ of habeas corpus in the California Supreme Court raising his direct appeal issues. *See In re Robbins*, 18 Cal. 4th 770, 814, fn. 34 (1998)(holding that claims of ineffective assistance of counsel may be brought on habeas when otherwise would be barred); *Massaro v. United States*, 538 U.S. 500, 504-08, (2003) (holding that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.") Thus, to the extent petitioner might still present his substantive claims to the California Supreme Court, petitioner's claim before this Court is not ripe.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 12, 2010

Respectfully submitted

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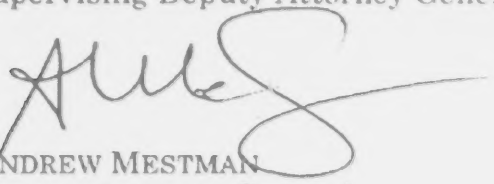

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CERTIFICATE OF SERVICE BY MAIL

I, Andrew Mestman, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **November 12, 2010**, three (3) copies of the **BRIEF FOR THE RESPONSE IN OPPOSITION** in the above-entitled case were mailed, first class postage prepaid to:

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I further certify that all parties required to be served have been served.

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 2,223 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 2010

Respectfully submitted,

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